A

Sri Ram a/l MS Sarma v United Overseas Bank (M) Bhd

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-03(IM)(NCC)-88–10 OF 2019
YAACOB MD SAM, HADHARIAH SYED ISMAIL AND SEE MEE CHUN JJCA
12 SEPTEMBER 2022

C

Bankruptcy — Creditor's petition — Appeal — Adjudicating order and receiving order entered against judgment debtor — Whether creditor's petition was defective for non-compliance with s 5(2) of Insolvency Act 1967 — Whether judgment debtor was deprived of his right to be heard — Whether High Court judge had erred in interpreting and applying res judicata — Insolvency Act 1967 s 5(2)

D

The judgment creditor ('JC') had granted banking facilities to Saron Holdings Sdn Bhd ('Saron'). As security for the facilities, the judgment debtor ('JD') had executed a guarantee in favour of the JC. The JD did not give any other security to secure the Saron facilities. Saron and the JD defaulted in the repayment of the Saron facilities which led to a civil suit filed. The JC obtained judgment against them both ('Saron judgment'). Saron had since been wound up. The JC issued a bankruptcy notice ('BN') against the JD for the entire outstanding sum under the Saron judgment. The BN was served on the JD for which there was no compliance and thereby an act of bankruptcy had been committed. The court issued the creditor's petition ('CP') and was served on the JD. There were various attempts to challenge the bankruptcy action. These were an application filed to set aside the BN, a notice filed to oppose the CP and an application filed to set aside the CP. All the applications were dismissed as were the appeals to the judge in chambers. The JD filed an application to stay the bankruptcy action which was dismissed. The deputy registrar proceeded to hear the CP and dismissed it. The JC filed an appeal to the judge in chambers which was allowed. The High Court judge ('HCJ') had allowed the JC's appeal premised on there being no requirement for compliance with s 5(2) of the Insolvency Act 1967 ('the Act') as the JD had not given any security for the Saron facilities. Further, res judicata applied as the JD could have but did not raise the issue of s 5(2) of the Act in its application to set aside the CP, its appeal to the judge in chambers and its application to stay the CP. The adjudicating order and receiving order ('AORO') was entered against the JD. Hence, this appeal. The JD also borrowed monies under a personal overdraft ('OD') facility from the JC. The JD gave charges over his lands as security. A default similarly ensued where the JC sought to enforce its rights as chargee. This time, the JD sought

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declaratory orders in relation to the JC's rights as chargee as to the redemption sum but was dismissed.

Held, dismissing the appeal with costs of RM5,000:

(1) The JC was not required to make any statement in the CP as required under s 5(2) of the Act. The JC was not a secured creditor under the Saron judgment for which it was not required to state either it would give the security up for the benefit of creditors or to state the estimated value, for the reason there was none to state. The determination of the application of s 5(2) of the Act was on one judgment, namely the Saron judgment, which was what the CP was premised on. The JD gave a guarantee and no other security. The charges were given on the OD facilities. When the JD asked for a redemption sum to discharge the charges, a statement was provided based on the consolidation of the accounts and this could not amount to providing a security. The JC's rights of consolidation could not be equated to creating a security in the charges to secure the Saron judgment. Therefore, the JD had not provided any security for the Saron facilities such that s 5(2) of the Act did not apply where the JC had no security to state (see paras 19, 23, 25 & 29).

(2) The JD had every ample opportunity of being heard throughout the bankruptcy proceedings. The appeal to the judge in chambers further allowed parties to ventilate their case and was by a rehearing. As the appeal against the dismissal of the CP had been allowed, it followed as a matter of course the AORO would be made. This obviated the need for the CP to be remitted where there was a rehearing by the judge in chambers (see paras 31–33).

(3) The issue of the application and compliance of s 5(2) of the Act could have been raised in the various applications filed by the JD. The HCJ had specifically stated such three applications namely the application to set aside the CP, the appeal to the judge in chambers and the application to stay the CP. Undoubtedly this brought res judicata to the fore. The JD ought not be allowed to raise this issue now (see paras 34–35).

[Bahasa Malaysia summary

Pemiutang penghakiman ('JC') telah memberikan kemudahan perbankan kepada Saron Holdings Sdn Bhd ('Saron'). Sebagai jaminan untuk kemudahan itu, penghutang penghakiman ('JD') telah melaksanakan jaminan kepada JC. JD tidak memberikan apa-apa jaminan lain untuk menjamin kemudahan Saron. Saron dan JD gagal dalam pembayaran balik kemudahan Saron yang membawa kepada saman sivil difailkan. JC memperoleh penghakiman terhadap mereka berdua ('penghakiman Saron'). Saron telah digulung. JC mengeluarkan notis kebankrapan ('BN') terhadap JD untuk keseluruhan jumlah tertunggak di bawah penghakiman Saron. BN telah diserahkan kepada

JD yang tiada pematuhan dan dengan itu tindakan kebankrapan telah dilakukan. Mahkamah mengeluarkan petisyen pemiutang ('CP') dan diserahkan kepada JD. Terdapat pelbagai percubaan untuk mencabar tindakan kebankrapan. Ini adalah permohonan yang difailkan untuk mengetepikan BN, notis yang difailkan untuk menentang CP dan permohonan yang difailkan untuk mengetepikan CP. Semua permohonan telah ditolak begitu juga rayuan kepada hakim dalam kamar. JD memfailkan permohonan untuk menangguhkan tindakan kebankrapan dan ditolak. Timbalan pendaftar terus mendengar CP dan menolaknya. JC memfailkan rayuan kepada hakim dalam kamar dan dibenarkan. Hakim Mahkamah Tinggi ('HMT') telah membenarkan rayuan JC berdasarkan tiada keperluan untuk mematuhi s 5(2) Akta Insolvensi 1967 ('Akta') kerana JD tidak memberikan sebarang jaminan untuk kemudahan Saron. Selanjutnya, res judicata terpakai kerana JD boleh tetapi tidak membangkitkan isu s 5(2) Akta dalam permohonannya untuk mengetepikan CP, rayuannya kepada hakim dalam kamar dan permohonannya untuk menangguhkan CP. Perintah penghakiman dan perintah penerimaan ('AORO') telah dimasukkan terhadap JD. Oleh itu, rayuan ini. JD juga meminjam wang di bawah kemudahan overdraf peribadi ('OD') daripada JC. JD memberikan cagaran ke atas tanahnya sebagai jaminan. Kemungkiran yang sama berlaku di mana JC berusaha untuk menguatkuasakan haknya sebagai pemegang cagaran. Kali ini, JD memohon perintah pengisytiharan berhubung dengan hak JC sebagai pemegang cagaran mengenai jumlah penebusan tetapi ditolak.

Diputuskan, menolak rayuan dengan kos RM5,000:

(1) JC tidak dikehendaki membuat apa-apa kenyataan dalam CP seperti yang dikehendaki di bawah s 5(2) Akta. JC bukanlah pemiutang bercagar di bawah penghakiman Saron yang mana ia tidak perlu menyatakan sama ada ia akan memberikan jaminan untuk faedah pemiutang atau untuk menyatakan nilai anggaran, atas sebab tiada untuk dinyatakan. Penentuan penggunaan s 5(2) Akta adalah atas satu penghakiman, iaitu penghakiman Saron, yang merupakan apa yang CP diasaskan. JD memberi jaminan dan tiada jaminan lain. Cagaran telah diberikan ke atas kemudahan OD. Apabila JD meminta jumlah penebusan untuk melepaskan gadaian, penyata telah disediakan berdasarkan penyataan akaun dan ini tidak boleh dianggap sebagai menyediakan jaminan. Hak penyatuan JC tidak boleh disamakan dengan mewujudkan jaminan dalam cagaran untuk menjamin penghakiman Saron. Oleh itu, JD tidak menyediakan sebarang jaminan untuk kemudahan Saron oleh itu s 5(2) Akta tidak terpakai di mana JC tidak mempunyai jaminan untuk dinyatakan (lihat perenggan 19, 23, 25 & 29).

(2) JD mempunyai peluang yang mencukupi untuk didengar sepanjang prosiding kebankrapan. Rayuan kepada hakim dalam kamar membolehkan pihak-pihak untuk menyuarakan kes mereka dan melalui

perbicaraan semula. Memandangkan rayuan terhadap penolakan CP telah dibenarkan, ia diikuti sebagai perkara yang pasti AORO akan dibuat. Ini mengelakkan keperluan untuk CP diremitkan apabila terdapat perbicaraan semula oleh hakim dalam kamar (lihat perenggan 31–33).

(3) Isu permohonan dan pematuhan s 5(2) Akta boleh dibangkitkan dalam pelbagai permohonan yang difailkan oleh JD. HMT telah menyatakan secara khusus tiga permohonan itu iaitu permohonan untuk mengetepikan CP, rayuan kepada hakim dalam kamar dan permohonan untuk menangguhkan CP. Tidak dinafikan ini membangkitkan res judicata. JD sepatutnya tidak dibenarkan membangkitkan isu ini sekarang (lihat perenggan 34–35).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189, SC (refd)

Dr R Ramachandran; ex p Ganeswary a/p Ponnudurai [2003] 5 MLJ 84, HC (refd)

Hasnah bt Che Hassan v Hongkong Bank Malaysia Bhd (formerly known as Hongkong Shanghai Banking Corp Ltd) [2010] 4 MLJ 241, HC (refd)

M Hashimi bin Ibrahim v Asia Commercial Finance (M) Bhd [2001] 4 MLJ 67, HC (refd)

Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan [1993] 2 MLJ 423, SC (refd)

Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal [2017] 6 MLJ 753, CA (folld)

Legislation referred to

Insolvency Act 1967 ss 2, 5(2)
Insolvency Rules 2017 r 89(2)

Appeal from: *Sri Ram a/l MS Sarma v United Overseas Bank (M) Bhd* [2018] MLJU 2038 (High Court, Kuala Lumpur)

Rabinder Singh (with Cheryl Patricia Fredericks) (Rabinder Budiman & Assoc) for the appellant.
Ng Sai Yeang (with Wong Chee Chien) (Raja, Darryl & Loh) for the respondent.

See Mee Chun JCA (delivering judgment of the court):

INTRODUCTION

[1] On 3 October 2019, the High Court judge ('HCJ') had allowed the appeal of the judgment creditor (JC) against the decision of the deputy

registrar ('DR') which dismissed the creditor's petition dated 4 May 2017. The adjudicating order and receiving order dated 3 October 2019 ('AORO') was entered against the judgment debtor ('JD').

BACKGROUND FACTS

Saron facilities

[2] The JC had granted banking facilities to Saron Holdings Sdn Bhd ('Saron'). As security for the facilities, the JD had executed a guarantee in favour of the JC. The JD did not give any other security to secure the Saron facilities. Saron and the JD defaulted in the repayment of the Saron facilities which led to a civil suit filed. On 17 December 2013, the JC obtained judgment against them both for RM1,731,249.35 calculated as at 17 July 2013 with interests and costs ('Saron judgment'). Saron has since been wound up.

[3] On 30 December 2015, the JC issued a bankruptcy notice ('BN') against the JD for the entire outstanding sum under the Saron judgment. On 12 February 2016 the BN was served on the JD for which there was no compliance and thereby an act of bankruptcy had been committed. On 4 May 2017, the court issued the creditor's petition ('CP'). The CP was served on the JD on 24 July 2017.

[4] The above are not disputed facts.

[5] There were various attempts to challenge the bankruptcy action. These were an application filed on 19 February 2016 to set aside the BN, a notice filed on 28 July 2017 to oppose the CP and an application filed on 31 July 2017 to set aside the CP. All the applications were dismissed as were the appeals to the judge in chambers.

[6] On 5 January 2018 the JD filed an application to stay the bankruptcy action which was dismissed on 7 May 2018. The DR proceeded to hear the CP and dismissed it on 30 August 2018. The JC filed an appeal to the judge in chambers which was allowed. Hence this appeal before us.

Benteng facilities and personal overdraft ('OD') facilities

[7] At around the same time as the Saron facilities, the JC granted banking facilities to Benteng Timur Sdn Bhd ('Benteng'). The JD too executed a guarantee in favour of the JC but did not give any other security to secure the Benteng facilities. The above scenario as in the Saron facilities happened, as in a default and a judgment sum was obtained for RM12,991,357.11. The JD has not paid the judgment sum.

[8] The JD also borrowed monies under a personal OD from the JC. The JD gave charges over his lands as security. A default similarly ensued where the JC sought to enforce its rights as chargee. This time, on 10 July 2014, the JD filed its 2014 OS seeking declaratory orders in relation to the JC's rights as chargee as to the redemption sum. The 2014 OS was dismissed on 28 July 2016 as was the appeal to the Court of Appeal on 13 December 2017 and leave to the Federal Court was likewise dismissed on 17 May 2018.

DECISION OF THE HCJ

[9] The HCJ had allowed the JC's appeal premised on there being no requirement for compliance with s 5(2) of the Insolvency Act 1967 ('the IA') as the JD had not given any security for the Saron facilities. Further, res judicata applied as the JD could have but did not raise the issue of s 5(2) in its application to set aside the CP, its appeal to the judge in chambers and its application to stay the CP.

THE JD'S APPEAL

[10] The thrust of the JD's appeal is three-fold, namely:

(a) that the CP was defective for non-compliance with s 5(2) of the IA;

(b) that the HCJ had failed to uphold the principles of *audi alteram partem* when it disallowed the JD from exhausting all arguments relating to the defective CP; and

(c) that the HCJ had erred in the interpretation and application of res judicata and principle of estoppel *per rem judicatum.*

[11] We shall now deal with the issues as raised by the JD.

APPLICATION OF S 5(2) OF THE IA

[12] Firstly, we do not think there is any dispute that if s 5(2) of the IA is not complied with, this will be fatal to the CP. In *M Hashimi bin Ibrahim v Asia Commercial Finance (M) Bhd* [2001] 4 MLJ 67 it was stated at p 73:

> ... Being a secured creditor, the respondent creditor should have stated the truck under the hire purchase agreement as a security at para 3 in the petition, giving its estimated value or stating that it has a security which it is willing to give up as provided for in s 5(2) of the Act. In the present case, the respondent creditor failed to state that in its petition. Section 5(2) of the Act is mandatory in its provision; therefore it must be complied with strictly. Thus, the failure to comply with the requirement is fatal to the petition. The appeal is allowed with costs and the orders of the learned SAR are hereby set aside. The petition is dismissed.

[13] The issue in this appeal is whether the JC is a secured creditor for the purpose of s 5(2) of the IA. It was contended by the JD that the JC was a secured creditor within the meaning of IA such that it must comply with s 5(2). Section 5(2) of the IA provides as follows:

> 5 Conditions on which creditor may petition
>
> (1) ...
>
> (2) If the petitioning creditor is a secured creditor he must in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of the debtor being adjudged bankrupt or give an estimate of the value of his security. In the latter case he may to the extent of the balance of the debt due to him, after deducting the value so estimated, be admitted as a petitioning creditor in the same manner as if he were an unsecured creditor.

[14] The definition of 'secured creditor' in s 2 is:

> 'secured creditor' means a person holding a mortgage, charge or lien on the property of the debtor or any part thereof as a security for a debt due to him from the debtor but shall not include a plaintiff in any action who has attached the property of the debtor before judgment.

[15] It is not disputed the JC had not stated any security in the CP. In para 3 of the CP, the following was stated:

> Bahawa kami atau juga mana-mana orang bagi pihak kami tidak nemegang sebarang cagaran ke atas harta penghutang tersebut, atau apa-apa ke atas mana-mana bahagiannya, untuk pembayaran jumlah wang tersebut.

[16] We find that the position in law has been succinctly set out by the Federal Court in *Perwira Habib Bank Malaysia Bhd v Samuel Pakianathan* [1993] 2 MLJ 423. At pp 432–433, this was said:

> ... in our view, what was crucial here was to determine whether under s 5(2) the appellant bank as a petitioning creditor was a 'secured creditor not in the loan agreement with the principal borrower, but under the contract of guarantee with Mr Samuel from which had emanated Mr Samuel's liability in the O 14 judgment and upon which in turn the bankruptcy notice and petition were based. In short, Mr Samuel was the only 'debtor' in the bankruptcy proceeding before the court on account of the judgment, and his alleged act of bankruptcy was governed by s 3(1)(i) for non-compliance with a bankruptcy notice. In the circumstances, we are of the opinion that the word 'debtor' appearing in both ss 2 and 5(2) must mean and should be limited to the actual 'debtor' involved in the particular bankruptcy proceeding and should not include any other debtors that may exist. Thus, in this particular petition, to clothe the appellant bank as a 'secured creditor' under s 5(2), it must be shown that the appellant bank was holding a mortgage, charge or lien on the property of Mr Samuel, as a security for the debt of RM11.2m due to the bank from Mr Samuel. It was common ground that Mr Samuel had not given any security and debenture, were admittedly given by the principal borrower and none

by Mr Samuel. In fact, the contract of guarantee executed by Mr Samuel was a third form of collateral or security given to the bank in addition to the landed charge and debenture. Thus, in this particular bankruptcy proceeding as far as Mr Samuel was concerned, the appellant bank was not secured creditor within the meaning of s 5(2), and as such non-compliance with its requirement could not be fatal to the petition.

[17] The Federal Court held that whether or not the petitioning creditor was a secured creditor was to be determined not in the loan agreement with the principal borrower but under the contract of guarantee with the respondent from which had emanated the liability. It was further held that for the appellant bank to be a secured creditor, it must be shown that the appellant bank was holding a mortgage, charge or lien on the property of the respondent, as a security for the debt due to the bank from the respondent. What is of crucial significance for our appeal here is the further statement that 'It was common ground that Mr Samuel had not given any security to the bank for his debt as a guarantor ... the appellant was not a secured creditor' (p 432).

[18] The same goes in this appeal. It is not disputed that the CP was issued on non-compliance with the BN which was issued on the basis of the Saron judgment. It is further not disputed the JD only executed a guarantee in favour of the JC as a security for the Saron facilities and did not give any other security.

[19] It follows that the JC has was not required to make any statement in the CP as required under s 5(2). The JC was not a secured creditor under the Saron judgment for which it was not required to state either it would give the security up for the benefit of creditors or to state the estimated value, for the reason there was none to state.

[20] The JD stated he has no issue with the principles enunciated in *Perwira Habib* but has sought to distinguish the case. According to the JD, this appeal has the added dimension of the JC's earlier position that the lands charged to it also secured the banking facilities to Saron (para 5, affidavit in reply to the JD's 2014 OS, encl 6/112–113), that the lands charged to it are unlimited and continuing securities for all monies due and owing under Benteng facilities, Saron facilities and OD Facilities (para 4, affidavit in reply (3) to the JD's 2014 OS, encl 6/128) and the position taken in the CP of its right to consolidation (paras 5–6, JC affidavit to CP, encl 4/64). It was also submitted that the High Court's finding in the 2014 OS that the securities created are intended to be continuing, supports the JD's position.

[21] We note that bankruptcy proceedings can only be proceeded on one judgment. This is made clear by r 89(2) of the Insolvency Rules 2017 as follows:

89(2) A creditor is not entitled to apply for the issue of a bankruptcy notice by combining two or more final judgments or final orders.

[22] In *Dr R Ramachandran; ex p Ganeswary a/p Ponnudurai* [2003] 5 MLJ 84 it was stated at p 86 as follows:

> ... Why then my rejection of the bankruptcy notice based on the current allocatur? I had taken that course of action as I had found that impugned bankruptcy notice wanting, it being founded, inter alia, on an allocatur, which had subsisted on more than one final judgment or order. It thus had contravened the requirements of bankruptcy law. Statutorily, it is established law that a creditor is not entitled to apply for the issuance of a bankruptcy notice by combining two or more final judgments of final orders, be they from the same suit or not. Rule 91(2) of the Bankruptcy Rules 1969 promulgates as follows:
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> > A creditor is not entitled to apply for the issue of a bankruptcy notice by combining two or more final judgments or final orders.

[23] The determination of the application of s 5(2) is therefore on one judgment, namely the Saron judgment, which is what the CP was premised on. The JD gave a guarantee and no other security. The charges were given on the OD Facilities. When the JD asked for a redemption sum to discharge the charges, a statement was provided based on the consolidation of the accounts and this cannot amount to providing a security.

[24] In relation to the consolidation as allowed under cl 34 of the charges, the High Court judge in the 2014 OS had this to say:

> [62] This argument in my view is without merit. Learned counsel is adding new terms into cl 34 that the plaintiff had agreed to be bound with. The plain and ordinary reading of cl 34 provides that the charges shall not be discharged until the defendant receive payment of not only money secured by the charges ie the plaintiff's personal overdraft facilities that was granted to the plaintiff but also all monies which are owing to the defendant under any other loans granted to even third parties from time to time, and even if such liability is a collateral one. The judgment the defendant had obtained against Benteng and Saron are evidentiary proof of how much the plaintiff owed the defendant. He is the guarantor for Benteng and Saron ...

[25] This meant the JC's rights of consolidation cannot be equated to creating a security in the charges to secure the Saron judgment.

[26] Further at paras 68–69 of the OS 2014 judgment it was stated:

> [68] The decision in *Re K* [1989] FLR 368 (*Law of Banking Volume 1: Banker & Customer* by Poh Chu Chai at pp 424–426) is instructive that a bank is entitled at any time to combine or consolidate the accounts or to set off all moneys whatsoever due by the bank from its customers. The facts of the case shows that the Bank of

India opened two deposit accounts for a customer Mrs F. She was granted an overdraft facility secured against the deposit accounts. In the agreement with the bank, the rights of the bank were spelt out as follows:

> In addition to the rights which you have in law, you shall also have the right at any time and without prior notice to me to combine and consolidated all or any of my accounts with the bank, and/or to set off all moneys whatsoever due by the bank to me whether on current account or deposit account ... which the bank may at any time hold ... for my account, against any liability incurred or to be incurred by me to the bank

... Otton J in that case said this about the defendant's right to consolidate or combine accounts:

> In my judgment, the right of the bank to combine is well established and is fundamental to the bank/customer relationship. It is means of establishing the indebtedness of the customers to the bank and the bank to the customers. In exercising this right, a bank is not asserting a claim over the moneys nor is it in conflict with the claims of the Crown. It is merely carrying out an accounting procedure so as to ascertain the existence and amount of one party's liability to the other. This can only be ascertained by discovering the ultimate balance of their mutual dealing ... Thus it entitles the bank at any time to combine or consolidate the accounts or to set off all moneys whatsoever due by the bank to Mrs F against any liability incurred by her to the bank

[69] In *Halesowen Presswork & Assemblies L v Westminister Bank Ltd* [1970] 3 All ER 473, the plaintiff claimed a named sum as money deposited with the defendant bank in one of two accounts maintained by the plaintiff and over which the defendant purported to exercise a right of lien on the plaintiffs' voluntary liquidation. On the right of bankers to combine the two accounts so that the bank can set off the debit against the credit, Lord Denning MR held at p 477:

> I think we should discard the use of the word lien' in this context and speak simply of a banker's right to combine accounts; or a right to 'setoff' one against the other.
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> Using this phraseology, the question in this case is this: suppose a customer has one account in credit and another in debit. Has the banker a right to combine the two accounts so that he can set off the debit against the credit, and be liable only for the balance? The answer to this question is: Yes, the banker has a right to combine the two accounts whenever he pleases, and set off one against the other, unless he has made some agreement, express or implied, to keep them separate ...

[27] It was on that premise the JD's OS 2014 was dismissed as the JC had the right to consolidate all of the JD's accounts and set off the monies in the credit balance under the OD facilities account against his debt under the Benteng facilities and Saron facilities. The JC was also entitled to include in the redemption sum monies owed by the JD under the Benteng facilities and Saron facilities. Refer to para 70.

[28] All these do not equate to creating any security in the OD facilities. The same goes to the securities being unlimited and continuing.

[29] We therefore find that the JD had not provided any security for the Saron facilities such that s 5(2) of the IA does not apply where the JC has no security to state.

No right to be heard when AORO was made

[30] The JD essentially contended that the merits of the CP had not been determined as at the time the AORO was made, such that he was deprived of his right to be heard. Bankruptcy proceedings are quasi criminal in nature and the strict provisions of bankruptcy law must be complied with (*Sumathy a/p Subramaniam v Subramaniam a/l Gunasegaran and another appeal* [2017] 6 MLJ 753).

[31] We certainly agree with the principles expounded in *Sumathy*. In this regard, we however agree with the JC's contention that the JD had every ample opportunity of being heard throughout the bankruptcy proceedings.

[32] The appeal to the judge in chambers further allowed parties to ventilate their case and is by a rehearing. In *Hasnah bt Che Hassan v Hongkong Bank Malaysia Bhd (formerly known as Hongkong Shanghai Banking Corp Ltd)* [2010] 4 MLJ 241 it has been said at p 248:

> ... An appeal to the judge in chambers, the jurisdiction to review, rescind or vary any order made by the registrar under the bankruptcy proceedings is a rehearing.

[33] As the appeal against the dismissal of the CP has been allowed, it follows as a matter of course the AORO will be made. This obviates the need for the CP to be remitted where there was a rehearing by the judge in chambers.

Res judicata

[34] We agree that the issue of the application and compliance of s 5(2) of the IA could have been raised in the various applications filed by the JD. The HCJ had specifically stated such three applications namely the application to set aside the CP, the appeal to the judge in chambers and the application to stay the CP. Undoubtedly this brings res judicata to the fore as per *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189 at p 200:

> There is one school of thought that issue estoppel applies only to issues actually decided by the court in the previous proceedings and not to issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, while another school of thought holds the contrary view that such

issues which might have been and were not brought forward as described, though not actually decided by the court, are still covered by the doctrine of res judicata ie doctrine of estoppel *per rem judicatum.*

We are of the opinion that the aforesaid contrary view is to be preferred; it represents for one thing, a correct even though broader approach to the scope of issue estoppel. It is warranted by the weight of authorities to be illustrated later. It is completely in accord or resonant with the rationales behind the doctrine of res judicata, in other words, with the doctrine of estoppel *per rem judicatum.* It is particularly important to bear in mind the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

[35] The JD ought not be allowed to raise this issue now.

CONCLUSION

[36] For the reasons given above, we find no appealable error by the HCJ in allowing the JC's appeal. We affirm the decision of the HCJ. We dismiss the JD's appeal with costs of RM5,000 subject to allocatur.

Appeal dismissed with costs of RM5,000.

Reported by Nabilah Syahida Abdullah Salleh